

GATT and the Multilateral Regulation of Banking Services**

The last two decades have witnessed an explosion in the growth of global financial operations, brought about by the liberalization of capital markets through changes in the regulatory and supervisory spheres and the introduction of new financial instruments. The process has been aided by technological innovations in telecommunications and data processing.¹

The nature and volume of the internationalization of finance have been impressive. From a survey of eleven industrial reporting countries and eight offshore financial centers² nearly one-third of total bank assets had international characteristics.³ The percentage of international transactions was as high as 90 percent of total bank assets in the eight selected offshore centers. Taken together, of the international assets for those two areas, approximately two-thirds were interbank transactions.⁴ This trend appears to have continued in subsequent years as witnessed by recent reports that the growth of interbank operations accounted for nearly three-quarters, or \$509 billion, of all claims for the eleven industrialized and eight offshore financial centers together, of which \$472 billion represented cross-border operations.⁵

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1. David F.I. Folkerts-Landau & Donald J. Mathieson, *Innovation, Institutional Changes and Regulatory Responses in International Financial Markets*, in *RESTRUCTURING BANKING AND FINANCIAL SERVICES IN AMERICA* 392, 396 (W.S. Haraf & R.M. Kushmeider eds., 1988); INGO WALTER, *GLOBAL COMPETITION IN FINANCIAL SERVICES* 181 (1988); *Trade and Development Report 1990* (UNCTAD Secretariat, New York, 1990) [hereinafter *TDR 1990*] at 107-13; *BANKS UNDER STRESS* ch. 1 (OECD, Paris, 1992).

2. Bahamas, Bahrain, Cayman Islands, Hong Kong, Lebanon, Netherlands Antilles, Panama, and Singapore.

3. *TDR 1990*, *supra* note 1, at 108.

4. *Id.*

5. *BANK FOR INTERNATIONAL SETTLEMENTS 60TH ANNUAL REPORT* (Apr. 1, 1989-Mar. 31, 1990) 126 (1990) [hereinafter *BIS 60TH ANNUAL REPORT*]. This trend has not been sustained in subsequent years. In 1991, there was a sharp cutback in interbank business as a result of banks' efforts

More importantly, in the context of this article, is the share of international financial transactions measured against other world economic activity, namely, output or manufacture,⁶ trade, and investment. According to statistical data issued by the United Nations Conference on Trade and Development (UNCTAD), since the 1970s international banking has grown at more than 20 percent per annum, which is approximately twice as fast as world trade (12 percent) and world output (10 percent).⁷ By 1987 international banking assets exceeded world trade by almost 40 percent, while between 1980 and 1987 the size of the international banking market had doubled in relation to total global fixed investment.⁸

The rate of growth tends to be overemphasized in light of the fact that the major suppliers and consumers of international financial services have been and remain the industrialized countries. In real terms, many of them continue to employ protectionist policies designed to restrict various banking and investment activities despite collective efforts to address the problem at global or regional institutional levels. Moreover, the figures quoted do not take account of the actual situation in many developing and less developed countries (LDCs) or even newly industrialized countries (NICs). The degree to which such countries have succeeded in liberalizing their financial markets may depend less on the easing of restrictive regulations (due to the lack of an effective administration to implement rules and regulations) and more upon specific national factors relative to the economy of a particular country. Examples of the latter are receivables from tourism or foreign workers' remittances that may result in the formation of a "curb" market in foreign exchange, or the presence of transnational corporations.⁹

The most significant changes among these countries appear to be the easing of restrictions on foreign borrowing for residents and the allowing of residents to hold portfolio investment in foreign currencies at home and abroad, in addition to granting nonresidents access to domestic capital markets.¹⁰

This article looks at the role of banking as a trade in service and its treatment

to comply with the Basle capital accord and seek a greater return on their assets (BIS 62ND ANNUAL REPORT (Apr. 1, 1991-Mar. 31, 1992)). The overall decline in interbank positions from end of 1990 to mid-August 1992 has been in the region of \$225 billion (INTERNATIONAL BANKING AND FINANCIAL MARKET DEVELOPMENTS, BIS, Monetary and Economic Department, Basle, Aug. 1992).

6. *Production and trade in services: policies and their underlying factors bearing upon international service transactions*, Report by the UNCTAD Secretariat, New York, 1985, ch. IV, U.N. Doc. TD/B/941/Rev. 1 (1985). The United Nations Conference on Trade and Development (UNCTAD) was established in 1964. It began as a U.N.-sponsored conference designed to deal with the twin issues of trade and development with particular reference to developing countries. G.A. Res. 1995 (XIX), 30 December 1964, 19 U.N. G.A.O.R. Supp. No. 15, at 1, U.N. Doc. 1/5815 (1965); see D. Cordovez, *The Making of UNCTAD—Institutional Background and Legislative History*, J. WORLD TRADE L. 243, 243-328 (1967).

7. *TDR, 1990*, *supra* note 1, at 110, table 28.

8. *Id.*

9. *TDR 1990*, *supra* note 1, at 113.

10. *Id.*

in the General Agreement on Trade and Tariffs (GATT)¹¹ multilateral negotiations of the Uruguay Round¹² within the context of a proposed framework General Agreement on Trade in Services (GATS). A brief review follows on the impact of the liberalization of trade in banking services on the international as well as the domestic level. Attention is then focused on a description of the GATT Uruguay Round negotiations on services, with special reference to banking services and the response of the banking industry and financial institutions to these measures. The basic principles of the framework GATS and the Annex on Financial Services are discussed with special emphasis on two elements: cross-border transactions and the entry and establishment of foreign banks in domestic markets.

I. Liberalization of the Trade in Banking Services

The internationalization of finance, that is, banking, securities, and insurance activity, on both the international and domestic planes, has grown dramatically during the last three decades. Since the late 1960s the international scene has been characterized by an overall liberalization of trade in banking services, brought about by changes in government regulation of the financial sector in industrialized countries. The move towards more open, market-oriented systems has been achieved by the progressive disbandment of interest rate controls,¹³ the restoration of currency convertibility that followed the breakdown of the "Bretton Woods" system of fixed exchange rates in the early 1970s, and the liberalization of capital flows in the second half of the 1980s.¹⁴ This move was largely forced upon the regulated sector by increased competition from the free sector in domestic markets as well as by services provided through a number of offshore banking centers (the latter in particular because of their efficiency).¹⁵

A further characteristic of the international scene is the difficulty in separating strict banking activities from activities in other financial sectors, for example, finance companies, security firms, insurance companies, and the like. The demarcation lines between the various financial sectors have become increasingly

11. The General Agreement on Tariffs and Trade (GATT), as amended, (to which 108 states are parties) was opened for signature on 30 October 1947 and entered into force on 1 January 1948, T.I.A.S. No. 1700, 55 U.N.T.S. 187, current text at IV GATT Basic Instruments and Selected Documents (BISD) 1-78 (1969) [hereinafter GATT].

12. The Uruguay Round, which deals with the proposed regulation of new areas including services, intellectual property, and foreign investment as well as the thorny issue of agriculture, was launched by the Ministerial Declaration on the Uruguay Round, September 20, 1986, GATT BISD 33/19 (1987), reprinted in 25 I.L.M. 1623 (1986).

13. BANKS UNDER STRESS, *supra* note 1, § 4.1.1.; Giorgio Szegö, *Regulation and Competition in Banking*, in LIBERALIZATION OF SERVICES AND INTELLECTUAL PROPERTY IN THE URUGUAY ROUND OF GATT (Proceedings of a Conference on the Uruguay Round of GATT and the Improvement of the Legal Framework of Services, Bergamo, Sept. 21-23, 1989) 192 (Giorgio Sacerdoti ed., 1990) [hereinafter Sacerdoti].

14. BANKS UNDER STRESS, *supra* note 1, § 4.1; TDR 1990, *supra* note 1, at 111-12.

15. BANKS UNDER STRESS, *supra* note 1, § 4.11; WALTER, *supra* note 1, at 183; Folkerts-Landau & Mathieson, *supra* note 1, at 400.

blurred where cross-border restrictions have been reduced or abolished. This tendency has been further encouraged by a process of financial conglomeration, that is, the amalgamation of banking and security business, as well as insurance activity, into one operational entity.¹⁶

The Organization for Economic Cooperation and Development (OECD), in its most recent report, has summarized the overall trend as a threefold progression from "deregulation" to "liberalization" and thence to "despecialization."¹⁷ According to this organization, the opening of the financial industry has led to increased banking prosperity, but the lack of uniformity among participating countries highlights its "financial fragility." By this is meant the deterioration of bank balance sheets, due to lower asset quality and declining profitability coupled with an increase in commercial risks and a greater degree of exposure to certain types of borrowers.¹⁸ Other observers simply point out that, despite efforts at greater liberalization, protectionism in the field of financial services remains widespread.¹⁹

On the domestic level, national authorities, confronted with new regulatory and supervisory challenges as a result of events on the international plane, which, at the same time, undermine their administrative control of domestic markets, have sought to implement more uniform regimes of prudential supervision. Various attempts in the industrialized countries at regulatory convergence and the harmonization of prudential supervisory rules have been instigated.²⁰

II. Multilateral Negotiations on Banking Services

The negotiations on trade in services, of which banking services form part, have been long and arduous. One reason is the absence of a theory on "trade in services" and in particular the failure to reach agreement on the concept and definition of "trade in services," prior to the commencement of the GATT Uruguay Round in 1986.²¹ The following analysis of the negotiating process

16. See generally *BANKS UNDER STRESS*, *supra* note 1, ch. 1.

17. *BANKS UNDER STRESS*, *supra* note 1, § 1.1.

18. *Id.* ch. 1.1; INTERNATIONAL MONETARY FUND, INTERNATIONAL CAPITAL MARKETS, WORLD ECONOMIC AND FINANCIAL SURVEYS 10-11 (1991); BIS 60TH ANNUAL REPORT, *supra* note 5, at 31-32; see reference to heightened concern on the part of the BIS, Richard Waters, *BIS Highlights Shift in Nature Risks Run by Banks*, THE FINANCIAL TIMES (London) Nov. 3, 1992, at 29.

19. WALTER, *supra* note 1, at 182; TDR 1990, *supra* note 1, at 149; *Trade and Development Report 1991* (UNCTAD Secretariat, New York, 1991) [hereinafter *TDR 1991*], at 196-99.

20. The Committee on Banking Regulations and Supervisory Practices (recently renamed the Basle Committee on Banking Supervision) was set up under the administrative auspices of the Bank for International Settlements, Basle, Switzerland, and acts in a consultative capacity, functioning mainly as a center for research and as a forum for high-level economic discussion among its members. See generally *BANK REGULATION AND SUPERVISION IN THE 1990's*, at 81-95 (Joseph J. Norton ed., 1991); TDR 1991, *supra* note 19, at 195; Folkerts-Landau & Mathieson, *supra* note 1, at 393.

21. This is taken up in a report entitled *Production and trade in services: policies and their underlying factors bearing upon international service transactions*, *supra* note 6, at TD/B/941/Rev.1, ch. I and ch. IV, at 20-24; Gary P. Sampson & Richard Snape, *Identifying the Issues in Trade in Services*, 8 WORLD ECONOMY 171, 171-81 (1985).

highlights some of the obvious failures that have arisen and the various reactions that have been voiced.

A. NEGOTIATING HISTORY

Trade in services entered the international trade arena during the GATT multilateral trade negotiations of the Tokyo Round (1973–1979), on the initiative of the United States Government.²² Initially, progress was limited to conducting research in the area and developing an international consensus on services. Developing countries' interest led to the introduction of services into the preparatory discussions for UNCTAD VI in 1983. This developed into a work program and a general study, supported by a number of individual sectoral studies, set up by this organization.²³

Notwithstanding a number of national and regional studies on services,²⁴ not until the present round of trade negotiations, the Uruguay Round, and despite some resistance from developing countries,²⁵ did negotiations on a framework GATS finally commence. The debate on services centered on a North/South split as to the desirability, scope, and content of certain services in any proposed agreement. The result was a compromise position reached in 1986 at Punta del Este.²⁶

From a procedural point of view the ministers, as representatives of their respective governments, rather than of GATT contracting parties, agreed to adopt part II of the Punta del Este Declaration. Service negotiations were to be kept outside the legal framework of the GATT and separated from trade in goods. (The negotiations were, however, considered as a single undertaking to be conducted within the same time frame as the rest of the Round.²⁷)

When it came to substantive matters, negotiating parties set the following objective:

to establish a multilateral framework of principles and rules for trade in services, including elaboration of possible disciplines in individual sectors, with a view to expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting economic growth of all trading partners and the development of developing countries. Such framework shall respect the policy objectives of national

22. Steven F. Benz, *Trade Liberalization and the Global Service Economy*, 19 J. WORLD TRADE L. 98 (1985); Murray Gibbs, *Continuing the International Debate on Services*, 19 J. WORLD TRADE L. 199 (1985); Christopher Bail, *Conceptual Problems and Possible Elements of a Multilateral Framework for International Trade in Services*, in Sacerdoti, *supra* note 13, at 42.

23. *Services and the Development Process*, UNCTAD, Aug. 2, 1984, U.N. Doc. TB/B/1008/Rev. 1 (1984); A.F. Ewing, *Why Freer Trade in Services Is in the Interest of Developing Countries*, 19 J. WORLD TRADE L. 147 (1985).

24. Gibbs, *supra* note 22, at 202; Bail, *supra* note 22, at 43.

25. Gibbs, *supra* note 22, at 201.

26. *See supra* note 12.

27. The Group Negotiating Goods (GNG), with overall responsibility for fourteen subgroups, and the Group Negotiating Services (GNS) both report to the Trade Negotiations Committee (TNC).

laws and regulations applying to services and shall take into account the work of relevant international organizations.²⁸

On the one hand, the three main elements of the objective, agreed to by all, were trade expansion, the promotion of economic growth, and the development of developing countries. The means of achieving this objective were to be transparency and progressive liberalization. On the other hand, the parties compromised with respect to policy objectives underlying the domestic regulation of various service activities—an important factor for the financial industry, which is highly regulated at the national level.

The overall objective of the negotiations on trade in services is not without criticism. This criticism is based on a common assumption that the trade policy system of the GATT should be extended to trade in services despite a current trade policy mechanism that is, in practice, outdated and anachronistic. The criticism is less about national treatment and market access, both perceived as vital elements in any framework GATS, and more about trade preferences, renewed discrimination, the imposition of unilaterally or bilaterally negotiated restrictions on quantities,²⁹ and subsidies.³⁰

In the context of financial services it has been noted that “a reconciliation of generic trade principles with the purposes of existing regulatory policies” may require considerable adaptation.³¹ An example is provided of “long-standing supervisory practices that depend upon confidentiality and administrative discretion” that “will have to be reconciled with transparency principle.”³²

The problem of the multilateral most favored nation (MFN) approach to trade also remains, together with the need to ensure that a reciprocal balance of rights and obligations is maintained. Even within the context of tariffs this balance has never been easy to deal with, the more so in the case of services where the objective is to achieve comparable levels of market access.³³ Indeed, services do not lend themselves readily to the exchange of concessions, upon which the GATT has traditionally been based.³⁴

Nor is this a problem unique to services. Article 64 of the proposed Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) refers to the application of GATT article XXII in settling disputes arising under the Agreement. As is well known, GATT article XXIII:1(a) affords a contracting party the possi-

28. See I.L.M., *supra* note 12, at 1627.

29. WALTER, *supra* note 1, at 206-07.

30. Thames Essay No. 56, R. DE C. GREY CONCEPTS OF TRADE DIPLOMACY AND TRADE IN SERVICES 11 (1989).

31. INTERNATIONAL MONETARY FUND, INTERNATIONAL CAPITAL MARKETS, DEVELOPMENTS AND PROSPECTS, WORLD ECONOMIC AND FINANCIAL SURVEYS 68 (1990).

32. *Id.*

33. Bail, *supra* note 22, at 51-52.

34. B. Hindley, The GATT's last GATS?, paper presented at a Conference on Uruguay Round Negotiations: Crisis and Response, convened by the Royal Institute of International Affairs, Mar. 7-8, 1991 (unpublished); Gibbs, *supra* note 22, at 215.

bility of filing a complaint where a benefit accruing to it has been nullified or impaired as a direct result of an infringement of GATT rules (*prima facie* nullification or impairment, giving rise to a "violation complaint"). GATT article XXIII: 1(b) gives a complainant a similar cause of action against a noninfringement measure that has led to the frustration of competitive benefits that could reasonably have been expected to accrue under reciprocal tariff concessions on goods, in the case of the GATT, or out of specific commitments, in the case of the GATS (a "nonviolation complaint").³⁵

Unlike goods and services, in the area of intellectual property rights the TRIPS Agreement does not provide for the negotiation of reciprocal concessions or commitments,³⁶ in addition to the basic protection of acquired rights and maintenance of intellectual property rights. Thus, the potential scope for settling intellectual property rights disputes in the event of a "nonviolation complaint" is curtailed. The TRIPS Agreement's failure to guarantee market access for the products in which those intellectual property rights are embodied³⁷ (for example, a right to sell patented pharmaceutical products) is a more serious problem.

Returning to the case of services, another problem emerges from the fact that comparative advantages in tradeable services are already heavily weighted in favor of the main service suppliers/consumers, most of which are developed countries, while these same countries have few worthwhile concessions to offer developing countries.³⁸

Not surprisingly, developing countries have been particularly vociferous in resisting the inclusion of sectors like financial services in the Uruguay Round negotiations for fear that sectoral competitive disadvantage would yield few benefits from liberalization. Their continued reliance on protectionist domestic regulatory and supervisory policies could, under the broader heading of "reciprocity," endanger trade concessions in areas of vital importance to them, for example, on agricultural products.³⁹ The way in which the negotiations on services generally and on financial services particularly have proceeded thus far would appear to bear this out.

35. E.U. Petersmann, *Violation Complaints and Non-Violation Complaints in Public International Trade Law*, 34 GER. YEARBOOK INT'L L. 175-229 (1991).

36. Intellectual property rights conventions, such as the Paris and Berne Conventions, are based on the nonreciprocity of basic obligations although there are a few exceptions to this principle in the Berne Convention at art. 2:7, art. 7:8 and art. 14:2. See Berne Convention for the Protection of Literary and Artistic Works (Paris 1971), 943 U.N.T.S. 178, reprinted in 4 NIMMER ON COPYRIGHT (1991).

37. Cf. "Super 301" under the U.S. Trade Act of 1974 codified as amended by Act of December 1988, §§ 301-306, 19 U.S.C. §§ 2411-2416 (1980 and Supp. 1988) at § 2242, which allows for action against countries which not only "deny adequate and effective protection of intellectual property rights" but furthermore "deny fair and equitable market access to United States persons that rely upon intellectual property protection"; the latter cause of action is unaddressed in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement.

38. Hindley, *supra* note 34, at 2.

39. WALTER, *supra* note 1, at 218-19; TDR 1990, *supra* note 1, at 141-43.

As to further progress on negotiations, the Group Negotiating Services (GNS) established a five-point agenda for the initial phase of the negotiations to include definition and gathering of statistical data; the concepts on which principles and rules for trade in services might be based; coverage; the relationship of existing disciplines and intergovernmental sectoral arrangements, for example, the International Civil Aviation Organization (ICAO) in relation to the Annex on Air Transport Services; and the regulatory framework.⁴⁰

The agreed text at the midterm review, signed in Montreal in 1988,⁴¹ recorded considerable progress in some areas, namely, that a mechanism for the progressive liberalization of market access would be central to the GATS. Also, once access had been granted the service suppliers could choose their preferred mode of delivery. Finally, the concept of "increasing participation of developing countries" was accepted, although some participants seized the opportunity to introduce the idea of graduation.⁴²

Perhaps of most importance for the financial sector, and especially banking, was the recognition that the provision of services frequently requires cross-border movement of factors of production, essential to the supplier. In other words, a commercial presence may be needed—a premise rejected prior to the Montreal review. This has led some skeptics to argue that perhaps the services issue in the Uruguay Round is principally about deregulating foreign investment.

The draft final text of GATS is essentially not very different from the one presented to the ministers at Brussels in December 1990. It consists of thirty-six articles, in six parts, as follows:

- scope and definition of trade in services;
- general obligations and disciplines (including, among others, MFN, transparency, developing countries' participation, exceptions to the general obligations, safeguards, and subsidies);
- specific commitments (market access and national treatment are the key ones);
- progressive liberalization on specific commitments;
- institutional provisions (including dispute settlement procedures as well as the establishment of a council for trade in services to oversee the Agreement); and
- final provisions.

Appended to this are a number of annexes, including, but not limited to, an Annex on Financial Services, a Schedule of Specific Commitments (relating to market access, national treatment, and additional commitments contained in part III), an Annex on Article II Exemptions (from MFN treatment in accordance with

40. Bail, *supra* note 22, at 44–45; S. GOLT, *THE GATT NEGOTIATIONS 1986–90: ORIGINS, ISSUES & PROSPECTS* 44 (1988).

41. 28 I.L.M. 1023 (1989); *see* note in *GATT Focus*, No. 61, May 1989.

42. Bail, *supra* note 22, 45–46.

article II:1) and an Annex on the Movement of Natural Persons supplying Services under the Agreement.

Also to be included is an Understanding on Commitments in Financial Services (the Understanding), which is intended as an alternative basis for (one could say an interpretation of) the specific commitments on market access and national treatment outlined in part III. This last instrument is not to be treated as an integral part of the GATS; instead, it will have a status beyond that of the negotiating guidelines and will form part of the Final Act. In short, it will be a separate, nonbinding instrument, which members may choose to apply as they see fit. However, it should be stressed that a decision has yet to be made on how the Understanding can be appropriately dealt with.⁴³

B. INSTITUTIONAL AND INDUSTRY RESPONSES

As already noted, UNCTAD⁴⁴ lent its voice to the debate on services from a very early stage; the financial services sector, for reasons also already mentioned, has remained a keen concern. Similarly, the OECD,⁴⁵ which has undertaken a number of studies and produced its own Code of Liberalization of Current Invisible Operations (Invisibles Code) in 1986, as well as a Code of Liberalization of Capital Movements, revised in 1989, has added its voice to the debate.⁴⁶

Both the IMF and the World Bank have joined the debate, in particular the IMF, since many financial transactions between residents and nonresidents involve foreign exchange control. Policies in this area "involve questions of macroeconomic management that transcend trade in banking services."⁴⁷

The Basle Committee on Banking Supervision, established under the auspices of the Bank for International Settlements (BIS),⁴⁸ has been instrumental in encouraging cooperation in the prudential supervision of international banks and has contributed much to the discussions on national treatment in the area of prudential regulations.⁴⁹

As for the industry, bankers have been less than enthusiastic about including

43. *Informal Note by the GATT Secretariat Containing a Review of Individual Texts in the Draft Final Act (General Agreement on Trade in Services (Annex II)) of 28 April 1992* ¶ 6.

44. See *supra* note 6.

45. The members of the OECD are twenty-four of the principal Western industrialized countries. It is a consultative organization and acts mainly as a center for research and as a forum for high-level economic discussion among its members. See further RICHARD W. EDWARDS, JR., *INTERNATIONAL MONETARY COLLABORATION* 68-72 (1985).

46. The OECD Codes of Liberalization have the legal status of OECD Council Decisions and are therefore binding on all members. See further OECD, *LIBERALIZATION OF CAPITAL MOVEMENTS AND FINANCIAL SERVICES IN THE OECD AREA* chs. I & II (1990) [hereinafter *LIBERALIZATION OF CAPITAL MOVEMENTS*].

47. *TDR 1990*, *supra* note 1, at 140.

48. See *supra* note 20.

49. BIS 60TH ANNUAL REPORT, *supra* note 5, at 212; *BANKS UNDER STRESS*, *supra* note 1, § 3.3; *TDR 1990*, *supra* note 1, at 158.

banking in a GATT forum of broad-based multilateral trade negotiations. The industry is generally viewed as complex and special and the possible concessions that might be exacted out of financial industries with important clients is a sensitive matter. It is still thought that penetration of the really important markets can be achieved without fundamentally altering the rules of the game.⁵⁰

III. Basic Principles of the Framework Agreement and Annex on Financial Services

Unlike physical goods, which can be counted, services are made up of a web of various intangibles many of which are concerned with rights and obligations.⁵¹ International banking is a good example since it implies claims and liabilities vis-à-vis residents that are denominated in foreign currencies, in addition to claims and liabilities vis-à-vis nonresidents denominated in either home or foreign currencies.⁵²

Taken in a wider sense, the term international banking denotes "all financial services and related ancillary services that may be offered by financial institutions such as banks, savings banks, securities firms, brokers, and other providers of financial services including non-financial enterprises" such as insurance companies⁵³ across borders or across currencies, that is, there must be either a nonresident element or assets denominated in a foreign currency.⁵⁴ These activities can be conducted in both onshore and offshore banking centers.⁵⁵

The sectoral Annex on Financial Services (subparagraph 5.1) defines "financial services" as any service of a financial nature offered by a financial service supplier of a member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance).

This definition is followed by a definitive list of financial service activities, subdivided into insurance activities and banking activities. The latter includes deposit-taking and lending activities, payments, trading in monetary instruments, foreign exchange dealings, and so on. It also includes asset management, settlement and clearance services, provision for and transfer of financial information, and advisory services.

50. WALTER, *supra* note 1, at 219.

51. Benz, *supra* note 22, at 95-96; cf. PHEDON NICOLAIDES, *LIBERALIZING SERVICE TRADE: STRATEGIES FOR SUCCESS* 11 (1989). This is also true for intellectual property rights. See Rajan Dhanjee & Lawrence Boisson de Chazournes, *Trade-Related Aspects of Intellectual Property Rights (TRIPS): Objectives, Approaches and Basic Principles of the GATT and of Intellectual Property Conventions*, 24 J. WORLD TRADE L. 5, 7 (1990).

52. TDR 1990, *supra* note 1, at 107.

53. G. BRÖKER, *COMPETITION IN BANKING* annex I at 105 (OECD 1989).

54. TDR 1990, *supra* note 1, at 138.

55. *Id.* at 107; INGO WALTER, *BARRIERS TO TRADE IN BANKING AND FINANCIAL SERVICES* 3 (1985).

The extremely complex nature of the financial industry is typified by the diversity of services and products offered and by the multiplicity of submarkets. Different banking systems, and variations in the way banking products and services are provided, regulated, and supervised emerges as an important factor when negotiating on trade in financial services generally and on banking services specifically.

The problem therefore arises of how to define the supply of banking services. Should it be restricted to strict cross-border transactions between the residents of one country and the nonresidents of another,⁵⁶ irrespective of where the transaction takes place? Alternatively, should there be a broader definition whereby services are provided by foreign-owned branches, subsidiaries, and affiliates of foreign-owned enterprises, with a degree of permanent commercial presence within the importing country?

The debate appears to have been substantially settled in favor of a broader definition since the Annex on Financial Services to the draft GATS specifically states that the supply of financial services under the Annex shall mean the supply of services, as defined in article I:2 of the framework Agreement, which applies to all types of services:

- (a) from the territory of one Member into the territory of any other Member;
- (b) in the territory of one Member to the service consumer of any other Member;
- (c) through the presence of service supplying entities of one Member in the territory of any other Member;
- (d) by natural persons of one Member in the territory of any other Member.

While international trade in banking services usually takes place by means of either cross-border trade or establishment-based activity, it often combines elements of both. The proposed Understanding on Commitments in Financial Services (the Understanding) opens the way for the Uruguay Round participants to assume specific commitments (on national treatment and market access) as the basis of an alternative approach to those covered in part III of the framework agreement. The Understanding contains very specific provisions on cross-border trade and commercial presence.

The two main areas of activity in banking as a trade in service—cross-border transactions and banking trade involving the establishment of a commercial presence—are examined separately. This is partly because establishment-based trade inevitably raises important and related issues of direct foreign investment, which have proved vital in negotiating on services across the board.

56. The accepted balance of payments definition is even narrower; the concept nonresident is specifically applied to economic actors whose presence in the economy of a territory is temporary and associated with a specific purpose. See INTERNATIONAL MONETARY FUND, *BALANCE OF PAYMENTS MANUAL* ¶¶ 59–66 (4th ed. 1977).

IV. Cross-Border Transactions

From the definition in the final GATS draft, cross-border transactions involve the supply of services by any of the four modalities already defined.⁵⁷ The supply of services (a) from the territory of one Member into the territory of any other Member or (b) in the territory of one Member to the service consumer of any other Member both involve the movement of one or more factors of production. (Movement of persons may be necessary in the form of salesmen or agents, although increasingly ancillary services like telecommunications and cross-border data flows, that is, service provision on a nonestablishment basis, are the preferred mode of delivery.⁵⁸)

The supply of a service from the territory of one country into that of another, as defined in subparagraph (a), would cover such activities as current transactions, for example, external payments and other foreign exchange activity, and also the provision of financing facilities or investment instruments by banks. It could also include asset management, advisory services, and agency services.⁵⁹

The definition in (b) of the supply of a service in the territory of one country to the consumer of another is typified by the provision of deposit facilities by a bank in one country to the residents of another.⁶⁰

In the case of cross-border transactions of types (a) and (b) the crucial point, from the view of a trade in service, is the extent to which controls over external payments have been relaxed.⁶¹ Indeed, many of these may not be considered as current transactions, but as capital transactions instead.

A. CAPITAL MOVEMENTS

In this context a major concern, although primarily from the point of view of developing countries and NICs, is the relaxation on the normal limits placed on residents opening bank accounts abroad, since this facilitates capital flight.⁶² Not all IMF member countries have complied fully with the duty of convertibility with respect to payments and transfers for current international transactions, set out

57. See *supra* part III.

58. R. Brian Woodrow, *Sectoral Coverage and Implementation within a Uruguay Round Services Trade Agreement: Paradox and Prognosis*, in *A NEW GATT FOR THE NINETIES AND EUROPEAN '92* (Int'l Conf. held in Tübingen, July 25-27, 1990, Baden-Baden, 1991) 237, 242 (Thomas Opperman & J. Molsbarger eds., 1991); WALTER, *supra* note 55, at 13.

59. LIBERALIZATION OF CAPITAL MOVEMENTS, *supra* note 46, ¶¶ 163-167.

60. Definitions in subparagraphs (c) and (d), but particularly (c), referred to below are more relevant in the context of foreign bank entry and the establishment of a commercial presence in domestic markets.

61. *TDR 1991*, *supra* note 19, at 201.

62. *Id.*; see David Spencer, *Capital Flight and Bank Secrecy: The End of an Era?*, INT'L FIN. L. REV., May 1992, at 17-24, for the distorting effect which capital flight has on the international banking system and the author's suggestion that this can best be addressed by international governmental coordination of tax administration.

in article VIII of the articles of Agreement of the International Monetary Fund, as amended (the Fund Agreement).⁶³

Article VIII, section 2(a) of the Fund Agreement prohibits the introduction by members of exchange restrictions on the making of payments and transfers for current transactions, except as otherwise authorized by the Fund. The concept of payments for current transactions as defined in article XXX(d)(1) of the Fund Agreement covers (i) payments for services, including financial services, and (ii) the provision of some financial services, that is, trade finance facilities.⁶⁴ For those members complying fully with the requirements of article VIII, section 2(a), the prohibitions on interference with international payments are confined to the financial aspects (namely, exchange controls) of current transactions and not to the underlying transactions themselves.⁶⁵ Similar prohibitions on interference with trade transactions, in the guise of quantitative restrictions, fall within the domain of the contracting parties to the GATT.⁶⁶

Capital transfers are not caught by the obligations of convertibility under the Fund Agreement.⁶⁷ Thus, under article VI, section 3 "[M]embers are free to control or not to control these transfers, provided that any controls that are employed do not impede payments and transfers for current international transactions."⁶⁸

Even so, no member may exercise controls on capital payments, which likewise place restrictions on payments for current transactions or which unduly delay the transfer of funds in settlement of outstanding commitments. However, this rule has two permitted exceptions laid out in article VI, paragraph 3. First, article VII, section 3(b) allows the member in question, in the event of the scarcity of a member's currency and subsequent to consultations with the Fund, to impose limitations on the freedom of exchange operations in the scarce currency as a temporary measure. Second, and more commonly, article XIV, section 2 of the Fund Agreement, permits a member, if it so desires, and without prior authorization from the Fund, to maintain for balance of payments reasons exchange restric-

63. Second Amendment of Articles of Agreement of the International Monetary Fund, Apr. 1, 1978, T.I.A.S. 8937, art. VIII [hereinafter Fund Agreement].

64. Fund Agreement, *supra* note 63. Art. XXX(d) states that: "Payments for current transactions means payments which are not for the purpose of transferring capital, and includes without limitation:

(1) all payments due in connection with foreign trade, other current business, including services, and normal short-term banking and credit facilities," *Id.* art. XXX(d).

65. James G. Evans Jr., *Current and Capital Transactions: How the Fund Defines Them*, 5:3 FIN. & DEV. 31 (1968).

66. GATT, *supra* note 11, art. XII.

67. Fund Agreement, *supra* note 63, art. VI, § 3 is entitled *Controls of Capital Transfers* and states in full:

Members may exercise such controls as are necessary to regulate international capital movements, but no member may exercise these controls in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments, except as provided in Article VII, Section 3(b) and in Article XIV, Section 2.

Fund Agreement, *supra* note 63, art. VI, § 3.

68. JOSEPH GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS 82 (1979).

tions on payments and transfers for current transactions that are in effect at the time it becomes a member.⁶⁹

In practice, many Fund members still avail themselves of these so-called "transitional arrangements" although they may not introduce new restrictions on payments for current transactions under article VIII without Fund approval.⁷⁰ Likewise, those countries that utilize the exception of article XIV, section 2 to impose restrictions on payments and transfers for current transactions also maximize the use of the available restrictions on capital transactions permitted under article VI, section 3. However, article XIV restrictions, once lifted as the balance of payments situation improves and the transition has been made to full implementation of article VIII, section 2(a), may not be reintroduced, except under article VIII with Fund approval.⁷¹

While any agreement on trade in services could have serious implications for countries' regimes for controlling external capital movements, some of the earlier proposals, notably from OECD countries, could have entailed obligations that went beyond those of IMF, articles VI and VIII.⁷² The final solution in the text of the GATS at article XI:2 (and not in the Annex on Financial Services, as per one suggestion) is a compromise.

Essentially, the rights and obligations of IMF members, as to the use of exchange controls and restrictions in conformity with the Fund Agreement, take precedence over provisions in the proposed GATS, with the proviso that restrictions shall not be imposed on any capital transactions inconsistent with specific commitments concluded under the GATS. The choice of wording is unfortunate, implying as it does a disparity between the IMF and the GATS. The wording in article XI:2 would have been better if drafted to read "without prejudice to the obligations of IMF members under the Fund Agreement."

The provisions of GATS article XI:1 on market access, in part III of the Agreement, are further reinforced by a note and supplementary provision that states that where a member has undertaken a specific commitment on market access, with respect to the supply of a cross-border service, and the cross-border movement of capital is an essential component of the service itself, that member is committed to allowing such movement of capital.

As to the operation of the GATS and matters that impinge upon the international monetary system, no arrangements comparable to GATT article XV are found in the proposed agreement, which provides for cooperation between the IMF and

69. Fund Agreement, *supra* note 63, art. XIV, § 2. Information on restrictions on service flows, including restrictions on capital payments, is collected by the IMF for its *Annual Report on Exchange Arrangements and Exchange Restrictions*.

70. However, art. VIII, § 2(a) of the Fund Agreement should not be seen as a license for members to impose restrictions with the approval of the Fund; *id.* art. VIII, § 2a; see 3 JOSEPH GOLD, *THE FUND AGREEMENT IN THE COURTS* 151 (1986).

71. *Id.*; Evans, *supra* note 65, at 31.

72. *TDR 1991*, *supra* note 19, at 201.

the contracting parties to the GATT. Nor is any consideration to be found of those countries, not IMF members, that adhere to the GATS.⁷³ Thus, part of the link between trade and payment that nominally exists in the GATT is absent in the proposed GATS.

For many of the industrialized countries concerned, there has been a substantial loosening of capital controls since the second devaluation of the dollar in 1974. The process has been inspired by various regional and other institutional measures. In the European Economic Community (EEC) all remaining restrictions on capital movements have been virtually removed.⁷⁴ Similarly, recent moves within the OECD, aimed at the liberalization of cross-border capital flows among its members in a nondiscriminatory manner, have recently received a fresh impetus.⁷⁵

B. CROSS-BORDER FINANCIAL SERVICES

Even where the liberalization of capital movements has been achieved, the provision of banking and financial services may still be restricted across borders.⁷⁶ What is meant here is the nonestablishment-based provision of a service. Most countries, for prudential and supervisory reasons, require establishment as a precondition for offering financial services, thereby excluding nonresident suppliers.⁷⁷ Yet a number of markets, many offshore, do not insist on establishment-based business.

This area is difficult to address, particularly in the diverse global market environment where multinational financial institutions have a strong presence combined with looser supervisory controls and regulatory harmonization.

In many instances cross-border services reveal that the particular banking or financial service supplied is inextricably bound with the related capital movement. In some cases the capital movement (an international syndicated loan) is clearly distinguishable from the service element (the role of the lead manager of the syndicate). In other cases the capital movement may be liberalized (the sale or swap of securities or long-term instruments), but the provision of the banking and financial service (through the services of a financial intermediary) may be restrained by domestic restrictions in either the supplier's or consumer's country

73. Cf. GATT, *supra* note 11, art. XV, § 6, which calls for "special exchange agreements."

74. Council Directive of 11 May 1960, as amended, leading to Directive 86/566 of 26 November 1986 Removing All Restrictions on Capital Movements Ancillary to Trade and Direct Investment, 1986 O.J. (L 332) 22; Council Directive 88/361 of 8 July 1988 Liberalizing All Remaining Restrictions on Capital Movements, 1988 O.J. (L 178) 5; *see also* Paolo Clarotti, *Harmonization for Banking and Securities Regulations in the EC*, in Sacerdoti, *supra* note 13, at 182; *BANKS UNDER STRESS*, *supra* note 1, ¶ 4.2.

75. OECD Code of Liberalization of Capital Movements, revised 1989 (Capital Movements Code); *see* LIBERALIZATION OF CAPITAL MOVEMENTS, *supra* note 46, ¶¶ 158-162; *see also* *BANKS UNDER STRESS*, *supra* note 1, ¶ 4.2.

76. *See* LIBERALIZATION OF CAPITAL MOVEMENTS, *supra* note 46, ¶ 163.

77. *BANKS UNDER STRESS*, *supra* note 1, ¶ 4.3.4.

(local licensing of professional financial intermediaries). Other examples of possible protectionist measures arising from the provision of a service include domestic regulations affecting portfolio management or pension fund management.⁷⁸

This problem has been addressed within the forum of the OECD by the adoption in 1961 of the Code of Liberalization of Current Invisible Operations, subsequently amended, although the measure adopted allows member countries a fair amount of discretion as to the regulation of promotional activities of nonresident suppliers. OECD members may also adopt measures to regulate competition, thereby ensuring the maintenance of fair and orderly markets, as well as sound financial institutions and investor protection policies, provided that the measures are not discriminatory against nonresidents.⁷⁹

The Understanding, which is appended to the GATS, contains detailed provisions covering specific commitments on cross-border trade. These provisions are intended to be applied in such a way that each member "shall permit nonresident suppliers of financial services to supply, as a principal, through an intermediary or as an intermediary, and under terms and conditions that accord national treatment" (subparagraph 3) the provision and transfer of financial information and data processing that relates to banking and other financial services, as well as advisory and other auxiliary services.

This Understanding is not yet finalized and will not form an integral part of the Final Act of the Uruguay Round, as will the overall GATS. Many participants in the services negotiations, including those from developing countries, or even NICs, may be unable or unwilling to make such specific commitments and in quite such detail due to their own lack of an adequate infrastructure to provide sophisticated banking and financial services. Alternatively, and more probably, they will be interested in establishment-based services since the main benefit to be gained here is the transfer of skills and know-how.

For those countries, mostly from the industrialized sector, the real test in liberalizing cross-border trade is in trying to balance liberalization objectives with domestic regulatory and supervisory concerns. This latter concern is partly catered for by the Annex on Financial Services (subparagraph 2.1) that includes a provision on domestic measures. This provision is included for prudential reasons to protect various individuals, for example, investors and depositors.

V. Banking Trade Involving Establishment of a Commercial Presence

The supply of banking services through the commercial presence of foreign banks in the territory of any other member (as defined in article I:2(c) of the GATS) is the preeminent article dealing with establishment of foreign banks. On

78. See LIBERALIZATION OF CAPITAL MOVEMENTS, *supra* note 46, ¶ 164.

79. BANKS UNDER STRESS, *supra* note 1, tbl. 5.

the trade side it is directly concerned with some of the key issues in negotiating services, namely, market access, national treatment, and progressive liberalization. (All three are the subject of separate, specific commitments under the proposed GATS.) At the same time it cannot be separated from questions of foreign direct investment.

It is for the latter reason that many developing countries have been reluctant to participate in the negotiations on trade in services in general and the trade in financial services in particular. Developing countries believe that the forum provided by the multilateral trade negotiations in the Uruguay Round is not the correct one to address multilateral direct foreign investment issues.⁸⁰ Inevitably, the recurring fear of many of these countries is that the rights rather than the responsibilities of the investor will receive the most coverage.

Actual evidence, collected so far from the available data, tends to suggest that developing countries are not necessarily at a comparative disadvantage when it comes to the internationalization of banking. Towards the late 1970s, multinational banking institutions with a developing country origin accounted for about 20 percent of branches and 6 percent of subsidiaries worldwide, with a particularly strong presence in India and Brazil.⁸¹ These countries are two of the more vociferous participants in the negotiations on trade in services generally. This is borne out by the "national treatment" studies undertaken in successive Department of Treasury reports to the United States Congress on *Foreign Government Treatment of U.S. Commercial Banking Organizations* (1979, updated 1984, 1986, and 1990).⁸²

Indian commercial banks by 1984 had 141 branches operating in twenty-five countries,⁸³ whereas previously international banking operations had been reserved mostly for financing India's external trade, as in so many developing countries. Banking operations in India have now grown to include raising funds in money and capital markets abroad. There are also examples of differentially favorable treatment towards foreign bank entry in some developing countries, although preeminently in the NICs. For example, in the Republic of Korea and in Taiwan foreign banks are exempted from a number of specific lending requirements otherwise demanded of domestic banks. Another example is that of Mexico, where Citibank was exempted from the nationalization of banks in 1982.⁸⁴

A. MARKET ACCESS

The principle of market access was briefly mentioned when looking at cross-border trade. It should be clearly distinguished from that of national treatment.

80. *TDR 1991*, *supra* note 19, at 202, 208-09.

81. *TRADE IN SERVICES AND DEVELOPING COUNTRIES* 17 (OECD 1989).

82. Referred to extensively in *TDR 1990*, *supra* note 1, at 196-99; *TDR 1991*, *supra* note 19, at 149-53.

83. *See supra* note 81.

84. *TDR 1990*, *supra* note 1, at 152.

Market access is the policy instrument by which governments exercise their discretionary powers as to which foreign banks shall be granted access to their domestic markets. The principle of national treatment comes into play once access has been granted and concerns the continuing treatment that the supplier of the banking services can expect to receive from the authorities of the importing country.⁸⁵

Banking is characterized by a number of submarkets, and the granting of market access to foreign banks may only apply to some of those submarkets. The importance of this cannot be underestimated for many developing countries. First, liberalization of the domestic banking system in some of these countries is seen as surrendering a degree of autonomy and flexibility in macroeconomic and development policies, particularly in such areas as exchange control, monetary policy, and the allocation of credit.⁸⁶ Second, where infant industry policies continue to play an important role in the financial sectors, market access can provide a valuable instrument for the achievement of the transfer of banking skills.⁸⁷

In other countries where a relatively high degree of liberalization has already been achieved, the emphasis is more on the need to maintain control over the process in order "to take account of the overriding importance of prudential considerations, monetary policies, and national development objectives."⁸⁸

As for OECD countries, the establishment of foreign banks has become widely accepted throughout the member countries. The way was already opened by the inclusion of an obligation to liberalize foreign bank establishment in the OECD Code of Liberalization of Capital Movements, as updated in 1986, and the OECD's National Treatment instrument.⁸⁹ The revised OECD Code of Liberalization of Current Invisible Operations of 1989 contains new provisions that strengthen liberalization obligations for nonresidents wishing to establish branches, agencies, and so on in the banking and financial sectors.

Throughout the negotiations on banking services, the OECD Member States have tended to favor an approach to market access that is broad in character (the so-called "negative approach" to commitments on market access). Underlying this, however, is the wish by some major countries to apply one major exception, the principle of reciprocity.⁹⁰

The move has gained impetus from within the EEC Member States by the Second Banking Directive, which became directly effective on January 1, 1993 (after the Own Funds Directive and Solvency Ratios Directive became effec-

85. *Id.* at 153.

86. *TDR 1991*, *supra* note 19, at 200.

87. *Id.*; see also *TRADE IN SERVICES IN DEVELOPING COUNTRIES*, *supra* note 81, at 18.

88. Working Group on Financial Services Including Insurance by SEACEN Countries; News of the Uruguay Round (NUR), Oct. 9, 1990, at 13.

89. *LIBERALIZATION OF CAPITAL MOVEMENTS*, *supra* note 46, ¶ 172.

90. *TDR 1991*, *supra* note 19, at 202; *BANKS UNDER STRESS*, *supra* note 1, ¶ 4.4.2.

tive).⁹¹ The Second Banking Directive builds on the First Banking Directive of 1977 and the Consolidated Supervision Directive of 1983, but goes further in its objective, which is to lift entry barriers within the Community.

Henceforth, a bank, or bank subsidiary (that is, a separate legal entity in which the original bank holds a controlling interest), which is licensed in one Member State, is permitted to establish branches throughout the Community without authorization from the host Member State and without the need for separate endowment capital (the single banking license concept).⁹² However, for the most part host Member States will remain responsible for supervising branch activities until the Community has adopted further coordination measures.

As a further development, the application of the single license concept will be extended by the EC authorities to the EFTA⁹³ member countries under the European Economic Area Treaty.⁹⁴ This provision will allow EFTA financial institutions to take up business anywhere within the newly formed free trade area and to conduct business on a host country basis.⁹⁵

The implications of the Second Banking Directive for non-EC Member countries should be noted since it does not, in the first instance, cover branches of banks headquartered outside the EEC. Therefore, branches of third-country banks cannot benefit from the single banking license system. Instead, the Directive leaves the granting of licenses for subsidiaries or branches of banks registered outside the EC to the discretion of each Member State. In so doing, Member States may be required to suspend authorization for such subsidiaries or branches having their parent in a non-EC country that does not grant market access⁹⁶ and national treatment to Community banks.⁹⁷

Thus, market access and competitive opportunities must exist in the other country comparable to those granted by the Community to non-EEC banks.⁹⁸ The insistence on reciprocity in granting market access has been criticized because of the uncertainty that prevails as to the exact interpretation that will be given to this principle, that is, the degree to which strict reciprocity will be enforced.⁹⁹

91. Council Directive 89/646, 1989 O.J. (L 386) 1.

92. COMMISSION OF THE EUROPEAN COMMUNITIES, COMPLETING THE INTERNAL MARKET—A COMMON MARKET FOR SERVICES 10–11 (Dec. 1990); Carter H. Golembe & David S. Holland, *Banking and Securities*, in EUROPE 1992: AN AMERICAN PERSPECTIVE 72–76 (Gary Hufbauer ed., 1990).

93. European Free Trade Area comprising Sweden, Norway, Austria, Finland, Switzerland, Iceland, and Liechtenstein.

94. Signed May 2, 1992; final draft at [1992] C.M.L.R. 921. The text of the agreement is reproduced in AGREEMENT ON THE EUROPEAN ECONOMIC AREA (Office for Official Publications of the European Communities, Luxembourg, 1992). The agreement is not yet in force.

95. See Michael Klein, *Extending the EES to Services*, in THE WIDER WESTERN EUROPE 70 (Helen Wallace ed., 1991).

96. Described in terms of "equivalent treatment" in the final provision of the Directive.

97. COMMISSION OF THE EUROPEAN COMMUNITIES, 1 COMPLETING THE INTERNAL MARKET: CURRENT STATUS 31 DECEMBER 1990—A COMMON MARKET FOR SERVICES (Dec. 1990).

98. See COMPLETING THE INTERNAL MARKET—A COMMON MARKET FOR SERVICES, *supra* note 92, at 75.

99. *Id.* at 69.

Likewise, the United States Congress has been considering a bill introduced into the Senate called the Fair Trade in Financial Services Bill. If adopted, this bill would permit federal regulators to deny licenses to financial institutions from other countries that do not afford U.S. financial institutions the same competitive opportunities, including effective market access, as currently available to domestic financial institutions.¹⁰⁰ Developing countries, conversely, are keen to retain a degree of flexibility in granting market access of a more limited and specific kind for the reasons already given (the so-called "positive list" approach on market access commitments).

The proposed Understanding takes up the commercial presence aspect of market access at subparagraph 5. It requires that each member, on the basis of the Understanding, grant to a financial service supplier the right of establishment or expansion (including through the acquisition of existing enterprises) in its territory, thereby further qualifying the specific commitment contained in article XVI:1 of the GATS. This obligation can be made subject to terms and conditions.¹⁰¹

B. NATIONAL TREATMENT

Article XVII of the GATS on national treatment is modelled on GATT, article III, paragraph 4. It is essentially designed to ensure that foreign suppliers of a service are not subject to discriminatory treatment under an importing country's internal taxes, laws, and regulations. Cross-border trade in services is treated essentially the same as that in goods. This treatment could differ, however, when the trade in services is establishment-based. OECD members in particular have favored going further and have put forward the broader concept of "equality of competitive opportunity."¹⁰²

The idea here is to seek a commitment removing all discrimination that might exist under current regulations or administrative practices. (Such discrimination may include that favorable toward foreign banks, to which this article has earlier referred.) An unfavorable type of discrimination may exist where a foreign bank enjoys *de jure* coexistence with domestic banks, but experiences *de facto* inequality of competitive opportunity. For example, capitalization requirements of foreign banks may be more stringent for prudential reasons. This distinguishing treatment is frequently justified by the application of differing regimes for domestic and foreign banks. The problem could be solved if a higher degree of coordination existed among the discrete supervisory authorities.

Another example of unfavorable discrimination is in the application of exchange controls to foreign banks, although such application may intrude on other areas of a country's monetary policies. Similarly, domestic antitrust legislation to control

100. *BANKS UNDER STRESS*, *supra* note 1, ¶ 4.4.2.

101. *See Understanding*, subpara. 6.

102. *TDR 1990*, *supra* note 1, at 154; *TDR 1991*, *supra* note 19, at 203.

monopolies and mergers may not be intended to deter or exclude foreign direct investment, but the effect may still have a protectionist impact.

The developing countries throughout the negotiations on trade in services have tended to favor a looser set of obligations than those sought by OECD members. One specific issue that arises in the developing country context is the infant industry protection for domestic banks. The GATT article III, paragraph 4 national treatment provision is compatible with infant industry tariffs levied at the border. A similar option for protecting domestic banks does not exist in the services context where foreign commerce is present because the border element is absent.

It has been suggested that infant industry protection, which would create differential banking regimes, be granted in another way. For example, differentially higher taxation could be levied on foreign banks, or limits could be placed on their access to retail deposits or refinancing facilities at the central banks. However, this runs counter to the usual package of inward investment incentives that many host countries offer to foreign banks (see the examples of the Republic of Korea and of Taiwan, cited earlier).

The transfer of banking skills and know-how is often one of the crucial considerations for developing countries when granting foreign banks market access and subsequent national treatment. A frequent proviso of many of them is a regulation relating to the hiring and training of local staff by foreign banks. The proposed GATS is silent on this issue as it is on the infant industry protection clause in general.

C. MOST FAVORED NATION TREATMENT

After much debate, conditional MFN treatment has been rejected. Instead, a compromise has been worked out whereby unconditional MFN treatment is first and foremost the key principle of the GATS (article II:1), but an Annex on Article II Exemptions has been added. This annex provides for periodic reviews as to the continuing status of exemptions that have been granted.

The two outstanding issues confronting the MFN principle, where banking services are supplied through a commercial presence, are: (1) the compatibility of MFN treatment with procedures that place ceilings on the total number of foreign bank entries into a particular market; and (2) the eligibility of receiving the benefits of concessions under GATS through application of the MFN principle.

In the first case, the permitted level of commercial presence for foreign banks is at issue. Application of unconditional MFN treatment is problematic because the granting of market access is bank specific rather than aimed at particular countries. This specificity runs counter to the fundamental MFN principle as enshrined in multilateral trading relations.

The nondiscriminatory application of the permitted exception to quantitative restrictions on goods (GATT article XIII) is inapplicable here. (In the case of market access, GATS article XVI:2 contains a list of restrictive measures that members shall not apply in granting market access, on similar lines to the prohibi-

tion on quantitative restrictions in GATT article XI.) One solution might lie in the Annex on Article II Exemptions that permits exemptions to the basic MFN principle, but these have to be detailed at the outset, are subject to periodic reviews, and terminate on the date provided for in the exemption.

In the second case, the eligibility to receive the benefits of concessions under GATS in accordance with the MFN principle is already running into difficulties. As anticipated, many countries, particularly developing ones, have chosen to include extensive limitations and conditions with regard to market access and national treatment in their offers submitted during the negotiations on commitments. Some of those offers have been prefaced with reservations concerning a right to modify the contents in light of the number of offers made by other parties to the negotiations and the degree to which they are equivalent and mutually acceptable. While it has been suggested that certain ground rules be applied to these offers, and these have essentially been included in GATS (article XIX:3), they do not cover the initial offer stage that exists at the moment.

The Group Negotiating Services has provided for three rounds of bilateral negotiations on initial commitments. As a result, by the end of March 1992 offers on initial commitments had been tabled by forty-seven participants. Of those, twenty-four had revised their offers, while in addition, thirty-two draft lists of intentions on MFN exemptions had been lodged with the Secretariat. Due to the action of the United States in tabling MFN exemptions, the scope and nature of which seriously threatened to undermine the whole negotiating process, no overall reconciliation of conditional offers has yet resulted, but negotiations are still under way.¹⁰³

D. DEVELOPING COUNTRY PARTICIPATION

The GATS includes preferential and differential treatment for developing countries (article IV in general) and, as with its counterpart GATT, it forms a major exception to the application of the general MFN principle. This ambiguity is reflected in the negotiating process that balances limitations and concessions in countries' offers for services as a whole (article IV:3 and article XIX:2 in particular). Under article XIX:2, the parameters for progressive liberalization on specific commitments are much less stringent for individual developing countries. Some of the relevant issues in increasing participation of developing countries in banking services have already been discussed and include the right of developing countries' governments to control market access as an instrument for achieving policy goals (infant industry protection, acquisition of essential banking skills, and hiring of local staff).

E. CROSS-SECTORAL SUSPENSION OF BENEFITS

The GATS, as presently drafted, clearly anticipates negotiations of commitments covering several different service sectors in a single process (article XIX).

103. *GATT Focus* 89, Apr. 1992, at 8.

This benefits developing countries since it affords them greater flexibility with respect to sectoral differences; credit can be given for sectors where developing countries are able to make greater commitments on liberalization that balance limitations on concessions elsewhere. Thus, for example, certain commitments on banking may be offset by limitations or concessions in telecommunications.

Inevitably, as in the case of GATT, in the event of nullification or impairment of a benefit that could be expected to accrue to a member as a result of a specific commitment of another member under part III of the GATS (a so-called "nonviolation complaint"), the affected member is entitled to suspend its obligations vis-à-vis the other party (article XXIII:4). Under the GATS, the suspension or modification of benefits arising from this action is not limited to a specific service sector although such a proposal was initially made in December 1990.¹⁰⁴

F. RESTRICTIVE BUSINESS PRACTICES AND ANTIDUMPING

Again within the framework GATS, provision has been made for dealing with some restrictive business practices, namely, those on monopolies and exclusive service providers (article VIII), while business practices are covered in a more general article (article IX). The first of these two articles is addressed to government-owned enterprises, while the second is aimed at private enterprises. The proposed Understanding has an additional provision on monopoly rights aimed at greater transparency, whereby members shall list in their schedule pertaining to financial services all existing monopoly rights besides endeavoring to eliminate or reduce their scope (section 1).

The number of activities with anticompetitive effects that might be considered relevant in the financial services context include so-called "club arrangements," which are primarily professional associations and groupings with specific objectives involving matters like payments systems, quotation, dealing, clearing, and settlement systems for securities markets and other financial instruments. They can prove very effective in discriminating against foreign suppliers of banking services in favor of domestic ones.

Other restrictive business practices include various types of exclusive dealing as well as discriminatory and predatory pricing. This latter activity, known commonly as dumping when applied to goods, is bound to be prevalent because banking is a service sector that offers possibilities and incentives for price discrimination. In particular the practice of cross-subsidization allows the local financial services of multinational financial institutions to gain a foothold in a particular market or increase its market share through aggressive pricing.¹⁰⁵

As with trade in goods, the difficulty with bringing an antidumping action in banking services lies in demonstrating material injury. No specific article in the

104. *TDR 1991*, *supra* note 19, at 206.

105. *WALTER*, *supra* note 55, at 45.

GATS deals with antidumping; the article on emergency safeguard measures (GATS article X) is too vague and offers no guidelines for such cases. Presumably it could only be contained within the wide scope of article IX on business practices.

G. REGULATORY HARMONY

The current negotiations do not specifically deal with this topic other than in broad terms of mutual recognition and harmonization (familiar terms to those acquainted with EEC policy and legislation) and is contained in subparagraph 3 of the Annex on Financial Services. However, it remains an important area, particularly since levels of development in regulatory systems for banking differ markedly from often rudimentary systems in some developing countries to highly sophisticated and coordinated efforts in many of the OECD and other industrialized countries.¹⁰⁶

Regulatory harmony also implies a considerable degree of transparency in order to render it effective. To this end, a regular vehicle is needed for the exchange of information about market access for, and restrictions on, the entry and operation of foreign banks in the territories of those countries participating in the GATS. To some extent, the provisions of GATS article III demands transparency in all service activities, with exchange of information and publication of national measures. A duty to notify of changes in national measures that may affect specific commitments under part III (that is, market access and national treatment) are contained in article III:3.

On the matter of governability of foreign banks (that is, their ability to use international networks to evade taxes and regulations of foreign exchange exposure) and their ability to resort to unfair pricing practices, progress can be expected to be much slower. The duty to notify and make information available is not enough. Indeed, the capacity of many regulatory authorities, even in developed market economies, to monitor many international banking operations is subject to major limitations, as was demonstrated in the recent case of the Bank of Credit and Commerce International.

VI. Conclusion

With the Uruguay Round of multilateral trade negotiations in its sixth year, the conclusion is tantalizingly close, but still proving unobtainable. While considerable progress has been made in other areas, the issue of agricultural subsidies has threatened to undermine the success of the entire Round.

In the area of services the GATS is in its final stages, save that the decision was taken at the last moment, with respect to the Annex on Financial Services,

106. See the work of the Basle Committee on Banking Supervision which also coordinates policy with other bodies on prudential supervision of international banks, e.g., the Advisory Banking Committee of the EEC Commission or the Offshore Supervisors' Group.

to admit a separate Understanding on Commitments in Financial Services. This appended document, which has already been referred to, redefines certain specific commitments on an alternative basis. On the other hand, it does not appear to have stymied the framework GATS nor the individual sectoral Annex on Financial Services that has been concluded thus far. However, progress has been slow in getting more countries to participate in the initial offer stage on concessions and limitations.

While the fate of the Uruguay Round may hang in the balance, all the endeavors so far on behalf of an agreement on services has not been in vain. Instead it has contributed greatly to the clarification of some of the major issues and obstacles involved in dealing with services, including the trade in banking. It remains to be seen whether the GATT contracting parties have the combined political will to finally put the GATS and its substantive proposals on financial services into effect.

